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Supreme Court, U.S.
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No.

In The
Supreme Court of the United States

ANDREW D. GLOGOWER,
Petitioner,

v.

SHARON P. CLARK, LIQUIDATOR OF NATIONAL BUSINESS ASSOCIATION TRUST AND NATIONAL BENEFIT ADMINISTRATORS,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should this Court resolve a conflict among the circuits in interpreting and applying 11 U.S.C. § 523(a)(4) of the bankruptcy code, which provides that a debt for defalcation in a fiduciary capacity is not dischargeable, so that all circuits comply with this Court's determination in *Chapman v. Forsyth*, 2 U.S. 202 (1844) that a denial of discharge for such defalcations requires a finding that the debtor took money from a technical or express trust?

2. Did the unpublished decision of the Ninth Circuit Court of Appeals effectively permit Kentucky state insurance regulations to override established Federal bankruptcy law, in violation of the bankruptcy uniformity clause of the U.S. Constitution?

PARTIES TO THE PROCEEDINGS

Petitioner is Andrew D. Glogower, the debtor in United States Bankruptcy Court, District of Arizona, appellant/cross-appellee on appeal to the District Court, and appellee on appeal in the Ninth Circuit Court of Appeals.

Respondent is Sharon P. Clark, successor to Janie A. Miller and George Nichols III, the Commissioner of the Kentucky Department of Insurance, serving as Liquidator of National Business Association Trust and National Benefit Administrators (the "Liquidator"). The Liquidator was the plaintiff in an adversary action in Bankruptcy Court, appellee/cross-appellant on appeal to the District Court and appellant on appeal in the Ninth Circuit Court of Appeals.

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PETITION FOR A WRIT OF CERTIORARI

Andrew D. Glogower ("Glogower") respectfully petitions for a writ of certiorari to review the memorandum decision of the Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The decision of the Ninth Circuit Court of Appeals is not reported, but the unpublished memorandum disposition dated April 3, 2009 is available on Westlaw at 2009 WL 887959. The order denying the Petition for Rehearing and the Petition for Rehearing En Banc dated May 11, 2009, and the decisions of the district court and the bankruptcy court are not reported. Copies of all four decisions are reproduced in the Appendix. (App. A, App. B, App. C, and App. D).

STATEMENT OF JURISDICTION

The judgment of the U.S. Court of Appeals for the Ninth Circuit was entered on April 3, 2009. A timely petition for rehearing/rehearing en banc was filed on April 15, 2009. The petition for rehearing was denied on May 11, 2009. This petition is timely under Supreme Court Rule 13.1 because it is filed within 90 days of entry of the denial of rehearing. The jurisdiction of the United States Supreme Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The United States Bankruptcy Code, 11 U.S.C. § 727 provides, as to a debtor under Chapter 7, that,

except in circumstances enumerated in that section and except as to certain categories of debts excepted from discharge under 11 U.S.C. § 523(a), "[t]he court shall grant the debtor a discharge." (App. E). 11 U.S.C. § 523(a)(4) excepts from dischargeability any debt "for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny." (*Id.*).

Article I, Section 8, Clause 4 of the U.S. Constitution provides for the power of Congress "To establish . . . . uniform Laws on the subject of Bankruptcies throughout the United States." (*Id.*).

STATEMENT OF THE CASE

It has been more than 75 years since this Court has visited the issue of non-dischargeability for defalcation in a fiduciary capacity under the U.S. Bankruptcy Code. In the interim, the Circuit Courts of Appeals have interpreted and applied 11 U.S.C. § 523(a)(4) and its predecessor, § 17(a)(4), in incompatible and contradictory fashion. The result is a hodge-podge of rulings, with no corresponding attempts to reconcile decisions among, between, and even within, the Circuits. This petition arises out of a Ninth Circuit Panel's refusal, in an unpublished decision, to apply even its own law.

This petition further arises out of the Ninth Circuit's insistence, perhaps reflecting the utter disarray of the published decisions, on elevating Kentucky state insurance law over Federal bankruptcy law. The Ninth Circuit, by inappropriately expanding the scope of non-dischargeability under 11 U.S.C. § 523(a)(4), not only failed to give proper effect to the discharge provision of 11 U.S.C. § 727, but violated the

federal preemption doctrine and the bankruptcy clause of the United States Constitution, Article I, Section 8, Clause 4.

A. Facts.

In the late 1980s, Glogower served as director of a company that administered types of "self insurance" or insurance alternative programs. One type of program administered by the company, referred to as a Multiple Employee Welfare Arrangement, involved a group of employers who made monthly contributions to a fund for the purpose of paying employee health care claims as they arise, instead of purchasing standard insurance.

National Business Association Trust ("NBAT") was created to provide health care benefits under certain identified health plans; National Benefit Administrators, Inc. ("NBA") was the administrator of NBAT. Glogower was an officer, director and shareholder of NBA.

In 1987, NBAT and NBA entered into an agreement whereby NBA was appointed plan supervisor to, *inter alia,* market and sell the plan and approve and administer claims. The agreement expressly provides that NBA is entitled to a fee of 20% of all contributions (the "20% Administrative Fee"). (App. F). The agreement further provides that NBA "shall not be liable for any failure or refusal by [NBA] to pay or honor any application for benefits" and that NBA is "expressly indemnified by [NBAT]" against any losses and shall incur no liability for any act or failure to act not connected with processing and payment of claims. (*Id.*).

As the District Court pointed out, "the 20% Administrative Fee was kept in an account separate from the 80% claims portion." (App. B, 21a). This is not a disputed fact in any of the opinions below. (See App. A, B, C).

In 1989, Glogower authorized a bonus payment from NBA to himself in the amount of $362,282.70 (the "Bonus Payment") and payments from NBA to himself to repay a promissory note for accrued but unpaid salary, in the total amount of $395,000.00 (the "Loan Payments"). The District Court pointed out that Glogower "received the Bonus Payment and the Loan Payments from the separate account holding the 20% Administrative Fee." (App. B, 21a). Again, this is not a disputed fact in any of the opinions below. (See App. A, B, C). During trial, the Liquidator's attorney admitted that the payments did not come from trust money:

> The Court: *** Are you going to put on evidence that he paid this money out of an express trust fund?
>
> Mr. Jordan: The checks did not come out of NBAT's account.

(App. J)[1].

---

[1] Continuing the colloquy, the Bankruptcy Court noted the difficulty this evidence posed for the Liquidator's case: "Well, isn't that going to be problematic for the defalcation of the fiduciary capacity? . . . Penick says you got show (sic) the – an express trust." (*Id.*).

B. Procedural Background.

1. The Kentucky State Court Orders.

The Franklin Circuit Court, Commonwealth of Kentucky (the "Kentucky State Court") entered orders (1) finding that NBAT was an unauthorized insurer doing business in Kentucky and insolvent, and ordering that NBAT be liquidated, (App. G); and (2) that NBA be liquidated (the "Kentucky Liquidation Order"). (App. H). The Kentucky State Court noted that the U.S. District Court for the Western District of Kentucky had previously determined that NBA as administrator for NBAT was "subject to regulation by state law" and that the District Court had "effectively determined that there was no distinction between NBA and NBAT for the ***application of Kentucky insurance laws***." (*Id.*, emphasis added). The Kentucky Court "determined that NBA and NBAT is a single identity" and ordered that NBA be placed into liquidation with NBAT. (*Id.*).

While establishing the single identity of NBA and NBAT, the Kentucky Liquidation Order does not address the legitimacy of the separate bank account maintained for contractual administrative fees. Nor does that Order purport to address or control future bankruptcy proceedings, including actions to determine non-dischargeability for defalcation in a fiduciary capacity under 11 U.S.C. § 523(a)(4). (*Id.*).

Contemporaneously, an investigation by the U.S. Department of Labor found no evidence of wrongdoing or commingling of funds: (1) "First, this does not appear to be the case where the subjects actively misled the trustees;" (2) "Second, while ultimately the

trust failed, it had a history of success;" (3) "The administrative fee charged by the administrators were likewise in conformity with industry standards;" and (4) "Finally, no evidence was developed of skimming or misappropriation of funds." (App. I). The Department of Labor accordingly declined to prosecute. (*Id.*)

2. The Bankruptcy Proceedings.

Glogower thereafter filed a Petition for relief under Chapter 7 of the Bankruptcy Code. The Liquidator's predecessor filed an adversary complaint alleging, *inter alia*, that Glogower's indebtedness for (1) the Loan Payments, (2) the Bonus Payment and (3) all unpaid NBAT claims was non-dischargeable under 11 U.S.C. § 523(a)(4), as having been incurred by defalcation in a fiduciary capacity.

During trial, the Bankruptcy Court noted that under *In re Penick*, 199 B.R. 16 (Bankr. E.D. Ky), *rev'd.* 149 F.3d 1184 (6th Cir. 1998) (unpublished), *cert. denied* 119 S.Ct. 619 (1999), one of the key elements in determining that a judgment is non-dischargeable "is that the money was taken from a trust fund." The Bankruptcy Judge quoted *Penick*'s statement of the second required element of non-dischargeability: "Relations create an express or implied trust that placed a specific risk (sic) in the hands of *Penick*," and enunciated his understanding of the key fact in this case: "Of the funds that came in, ***20 percent were to go to NBA*** to pay, in effect, their overhead and their operations. And so I would assume, at this point, that that's ***not a trust fund***, that portion of it." (App. K) (emphasis added).

Nevertheless, by Order dated July 9, 2004, the Bankruptcy Court ruled that the Bonus Payment and the Loan Payments, plus pre- and post-judgment interest thereon, were not dischargeable pursuant to 11U.S.C. § 523(a)(4). The Court ruled in favor of Glogower on the third category of claims, finding that Glogower's "apparent liability for all of the unpaid claims of NBAT" was dischargeable in bankruptcy. (App. C).

3. The District Court Appeal/Cross-appeal.

Both parties appealed the Bankruptcy Court decision, and the intermediate appeal was heard by the United States District Court, District of Arizona. By Order dated May 25, 2007, entered May 31, 2007, the District Court reversed the Bankruptcy Court's finding that the Bonus Payment and Loan Payments were not dischargeable under 11 U.S.C. § 523(a)(4) and affirmed the Bankruptcy Court's finding that Glogower's apparent liability for all of the unpaid claims of NBAT was dischargeable. (App. B).

Noting that 11 U.S.C. § 523(a)(4) excepts from discharge a debt "for fraud or defalcation while acting in a fiduciary capacity," the District Court pointed out that the Ninth Circuit's broad general definition of fiduciary – a relationship involving confidence, trust and good faith – is inapplicable in the dischargeability context. (*Id.*). The District Court noted both that the Ninth Circuit has adopted a narrow definition of "fiduciary" for purposes of § 523(a)(4) and that the rule adopted by the Sixth Circuit, which encompasses Kentucky, is the same as that in the Ninth Circuit. The term "fiduciary" under § 523(a)(4) applies only to "express or technical trusts." (*Id.*, citing *In re Cantrell*,

329 F.3d 1119, 1125 (9th Cir. 2003); *In re Brady*, 101 F.3d 1165, 1173 (6th Cir. 1996)).

4. The Ninth Circuit Appeal.

The Liquidator appealed to the Ninth Circuit the District Court's determination of dischargeability with respect to the Bonus Payment and the Loan Payments. The Liquidator's briefs focused not on 11 U.S.C. § 523(a)(4) or other bankruptcy law, but on the underlying insurance regulations, arguing that the District Court's finding of non-dischargeability under federal bankruptcy law created an "obvious loophole [that] further obstructs regulator's ongoing efforts to effectively regulate the insurance industry." Thus, the first of the two issues raised by the Liquidator on appeal was whether the District Court decision "failed to give full faith and credit to the final order of the Commonwealth of Kentucky, Franklin Circuit Court (***in a state insurance insolvency proceeding***)." An amicus curiae brief filed by the National Association of Insurance Commissioners ("NAIC") similarly argued that the Kentucky Liquidation Order is entitled to "deference" over the Bankruptcy Code. The mission of the NAIC, as stated in the amicus brief, is to "support and improve state regulation of insurance." Accordingly, the amicus brief addressed, exclusively, state insurance regulations, as evidenced by the headings: (1) "The Kentucky Court's Ruling has not been Given Due Deference;" (2) "The Nonadmitted Insurance Model Act is Undermined by the District Court's Ruling;" and (3) "State Regulation of Insolvency is Jeopardized by the Discharge of These Liabilities."

Proceedings before the Ninth Circuit suggest that the appellate panel accepted at face value the theory of the Liquidator and the NAIC: that, despite the Liquidator's having invoked the bankruptcy jurisdiction of the federal courts by initiating an adversary proceeding, and despite that its adversary complaint is couched entirely, and properly, in terms of the elements of dischargeability under 11 U.S.C. § 523, this is really a case of Kentucky insurance regulation. In the first minutes of oral argument the Honorable R. Tallman, suggesting that "we can sort of get right to the heart of it here," noted the factual finding by the Kentucky State Court that NBAT and NBA "were one in the same entity," and declared that he "read that as being the alter ego, pierce the veil, whatever you want to call it." Stating further that "on top of that we have the fact that Mr. Glogower did not bother to comply with any of the insurance regulations of the State of Kentucky," Judge Tallman framed the issue on appeal as whether the bankruptcy court must "give full faith and credit to that factual finding [in state court] as to the issue of being one in the same for purposes of assessing fiduciary obligations under ERISA." (App. L). Despite counsel's repeated attempts to apply federal law under 11U.S.C. § 523(a)(4), the Panel continued to press insurance regulation issues:

> Judge Tallman: Well, that in part is a breach of the fiduciary duty, is it not, the failure to properly underwrite the insurance risk so that you collect sufficient premiums from the employers to see to it that all of the anticipated claims will be paid? ***

> Ms. Sandweiss: That's not the standard though under § 523. That may or may not be a standard of breach of fiduciary duty, and it may have been a breach under the unauthorized insurance laws. But remember, this is not a Kentucky state law case.

(App. L).

On April 3, 2009, the Ninth Circuit Panel filed its Memorandum reversing the District Court's finding of dischargeability. The Panel, giving lip service to Ninth Circuit law, recited that, for liability to be imposed under 11U.S.C. § 523(a)(4), a fiduciary relationship must be one arising from an express or technical trust that was imposed before and without reference to the wrongdoing. (App. A, citing *In re Lewis*, 97 F.3d 1182, 1185 (9th Cir. 1996)). The Panel then proceeded to give conclusive effect to its interpretation of the Kentucky Liquidation Order. The Panel rejected Glogower's argument that because the Bonus Payment and Loan Payments were paid out of a separate administrative account they were not made in violation of a fiduciary duty of the sort required by § 523(a)(4) and applicable cases; as grounds for its finding, the Panel noted that the Kentucky Liquidation Order had determined that NBAT and NBA were one entity and "we owe full faith and credit to this factual determination." The Panel found that the Loan Payments and Bonus Payment constituted defalcation under 11U.S.C. § 523(a)(4), because Glogower had paid himself "when he was fully aware that the entities (NBAT/NBA) he controlled could not pay the claims due the plan beneficiaries."

On May 21, 2009, the Liquidator filed a request that the Memorandum be re-designated as an opinion and published. (App. M). The Liquidator noted that the Memorandum had "***made a number of critical holdings pertinent to states' power to regulate insolvency and liquidation and the 11U.S.C. § 523(a)(4) dischargeability of debts incurred by an Employment Retirement Incomes Security Act ('ERISA') fiduciary.***" (*Id.*, emphasis in original). The Liquidator argued that there is a paucity of available case law on this issue, particularly "as it relates to ***unauthorized insurance trusts***." (*Id.*, emphasis added).

The Liquidator emphasized that the rule "does more than simply resolve a long-standing dischargeability case," putting forth as evidence the NAIC's amicus brief, and arguing that "the outcome of this case will impact ***the state-based*** system of insurer insolvency regulation – with particular relevance to the accountability of insurance trust fiduciaries to their policyholders." (*Id.* emphasis added).

The Liquidator argued that the Federal bankruptcy code requirements were merely a "glaring loophole" in state insurance regulation and that the bankruptcy code "loophole" could obstruct efforts "to effectively regulate the insurance industry." (*Id.*). The Liquidator chided even the bankruptcy court for "want[ing] to hear testimony on whether" the administrative fee paid to Glogower "constituted trust fund money" [which is precisely the requirement under 11U.S.C. § 523(a)(4)]. The Liquidator complimented the Ninth Circuit Panel for seeing through this purported ploy in applying bankruptcy law, and for instead deferring to

the Kentucky State Court on this issue that "is of critical importance to the effective regulation of the insurance industry." (*Id.*). The Liquidator further explained that the Ninth Circuit Panel's "explicit provision of full faith and credit to the Kentucky state court's ruling on the structure of the insurance trust and administrator in question is critical to the effective control of unauthorized insurance." (*Id.*). Finally, the Liquidator argued that "to further pervasive public interest in the effective regulation of the insurance industry," this case should be published. (*Id.*).

Glogower notified the Ninth Circuit that it disagreed with the Liquidator's analysis but had no objection to publication. On May 26, 2009, the request for publication was denied. (App. N).

C. Basis for Federal Court Jurisdiction in the First Instance.

This is a review of a Judgment of a United States Court of Appeals. That Judgment followed an appeal from a final Judgment of the United States District Court for the District of Arizona. The District Court Judgment arose out of an appeal and a cross-appeal from a final Judgment of the United States Bankruptcy Court for the District of Arizona, and was an appeal of right to the District Court, following a timely statement of election, pursuant to Bankruptcy Rule 8001(a). Therefore, the federal court properly had jurisdiction in the first instance.

REASONS FOR GRANTING THE PETITION

This Court has not addressed the proper interpretation of "defalcation in a fiduciary capacity"

under the Bankruptcy Code since 1934, long before implementation of the current version of 11 U.S.C. § 523(a)(4). The void in Supreme Court law has produced widely divergent and contradictory results among the Circuits, and it is necessary and appropriate that the conflicts be resolved.

This Court first set the standard in 1844, providing that defalcation in a fiduciary capacity under the Bankruptcy Code requires the existence of an express or technical trust. *Chapman v. Forsyth*, 2 U.S. 202, 207 (1844). Later, this Court made clear that the technical trust must exist prior to the act creating the debt and without reference to that act. See *Upshur v. Briscoe*, 138 U.S. 365, 378 (1890). The last time this Court revisited defalcation in a fiduciary capacity under the Bankruptcy Code, it reiterated that the debtor "must have been a trustee before the wrong and without reference thereto." *Davis v. Aetna Acceptance Co.*, 293 U.S. 328, 333 (1934). But since 1934, this Court has been silent on the issue.

The Ninth and Sixth Circuits hold unequivocally that, for purposes of dischargeability under 11 U.S.C. § 523(a)(4), a finding of defalcation requires the misappropriation or failure to properly account for funds that constitute a specific trust "res." *In re Cantrell*, 329 F.3d 1119, 1126 (2002); *In re Garver*, 116 F.3d 176, 178 (6th Cir. 1997). The Ninth and Sixth Circuits are joined by the Tenth, and to a slightly lesser extent the Eleventh and Eighth Circuits, in holding that a trust res must exist before there can be a finding of defalcation under 11 U.S.C. § 523(a)(4). *In re Young*, 91 F.3d 1367, 1371-1372 (10th Cir. 1996); *In re Fernandez-Rocha*, 451 F.3d 813, 819 (11th Cir. 2006); *Hunter v. Philpott*, 373 F.3d 873, 874 (8th Cir.

2004). These circuits follow this Court's early decision in *Chapman,* 2 U.S. at 207. But there is a split among the remaining Circuits as to the requirements under 11 U.S.C. § 523(a)(4), with some Circuits holding that a fiduciary such as a lawyer, a majority stockholder, or even a country's ambassador, are automatically fiduciaries for all purposes and thus subject to nondischargeability as a fiduciary under the Bankruptcy Code. See *Marchiando v. State of Illinois*, 13 F.3d 1111 (7th Cir. 1994). Even within a single Circuit, a debtor may be entitled to a discharge under one panel's interpretation, but not under another. See *Hunter,* 373 F.3d at 874; *cf In re Cochrane*, 124 F.3d 978, 984 (8th Cir. 1997). The results are so at odds as to be utterly irreconcilable.

As this Petition demonstrates, the Circuit Courts are perplexed as to the proper interpretation of 11 U.S.C. § 523(a)(4), clashing both in the standards they have articulated and in the results they have reached. As this Petition further demonstrates, the gross conflicts lead to the anomalous result in this case – that is, the Ninth Circuit, in its published opinions, clearly requires the finding of an express trust *res*, imposed before the act creating the debt and without reference to wrongdoing, but in this unpublished decision, the Ninth Circuit Panel deemed itself free to adopt the broad definitions of fiduciary described in other Circuits. Mr. Glogower could not possibly have known, at the time he received the payments out of the 20% Administrative Fee, whether the Ninth Circuit would enforce its own interpretation of 11 U.S.C. § 523(a)(4), the Fifth Circuit's broad interpretation, or even the Eighth Circuit's conflicted interpretation, each of which produces a different result on the same set of facts. The results in the various Circuits are

irreconcilable. Because the Constitution requires uniformity among bankruptcy laws throughout the nation, the conflicts must be resolved by this Court, and this Court should granted certiorari in order to resolve this split. *AT & T Corp. v. Hulteen*, 129 S.Ct. 1962, 1968 (U.S., 2009)

Granting of the Petition is further appropriate for the independent reason that the Ninth Circuit Panel has effectively permitted Kentucky state insurance law to overrule the discharge and fresh start provisions of the United States Bankruptcy Code, in violation of the Bankruptcy Clause, U.S. Const., Art. 1, § 8, Cl.4 and basic principles of federal preemption. The Ninth Circuit has disregarded established federal law, and imposed upon Glogower a punitive result justifiable only by reference to state law policies. Review by this Court is necessary and appropriate lest the principles and legal protections embodied in the Bankruptcy Code be further eroded to suit the demands of state regulators.

The full impact of the Memorandum, and its potential for misuse, become fully apparent upon review of the transcript of oral argument and the Liquidator's request for publication. The Liquidator's agenda could not be more apparent: the thrust of the case, and the appeal in particular, is to promote and extend an agenda of closing bankruptcy-related "loopholes" to further the interests of state insurance regulators, and the Memorandum, intentionally or not, fosters that agenda at the expense of the rules and policies of federal bankruptcy law.

This case is not about state insurance insolvency law; it is a bankruptcy case, to be considered and

determined under the Bankruptcy Code, in general, and 11 U.S.C. § 523(a)(4), in particular. The drafters of the Bankruptcy Code, weighing the interests of creditors against the policy considerations favoring a "fresh start" for Chapter 7 debtors, carefully enumerated and defined those limited categories of debts that are excepted from discharge. The question on appeal thus was not whether the Kentucky State Court properly determined that Glogower was liable for certain debts under Kentucky state law, but whether Glogower was entitled to discharge of those debts under Federal bankruptcy law. By departing from this framework of analysis, the Ninth Circuit not only violated fundamental principles of federal preemption but failed to give effect to Article 1, Section 8, Clause 4 of the Constitution regarding the enactment of uniform bankruptcy laws. This Court should, accordingly, grant certiorari to address the Ninth Circuit's dual violations of the Bankruptcy Clause.

I. THE CIRCUITS ARE IRRECONCILABLY SPLIT ON THE PROPER INTERPRETATION OF DEFALCATION IN A FIDUCIARY CAPACITY UNDER 11 U.S.C. § 523(A)(4); IT IS APPROPRIATE, AFTER 75 YEARS OF SILENCE, THAT THIS COURT WEIGH IN AND RESOLVE THE CONFLICT.

A. Non-Dischargeability of Debts in Bankruptcy.

It is one thing for a creditor to have a valid claim. It is quite another for the claim to be determined non-dischargeable. The filing of a petition in bankruptcy triggers an automatic stay of actions against the debtor, the creation of an estate, and the appointment

of a trustee. See 11 U.S.C. §§ 362, 541 and 701. The estate comprises the property that will be available to satisfy the costs of bankruptcy administration and pay allowed claims of creditors, subject to the right of the debtor to declare some of the estate exempt under 11 U.S.C. § 522(b). See 11 U.S.C. § 541; *Segal v. Rochelle*, 382 U.S. 375 (1966) (What constitutes "property" in a bankruptcy estate must be determined by the Bankruptcy Code). To the extent that a creditor may have a right to payment, the Bankruptcy Court has exclusive authority to determine the amount and allowance of such creditor's claims. *Brown v. Gerdes*, 321 U.S. 178 (1944).

The bankruptcy court is required to grant a Chapter 7 debtor a discharge, affecting pre-petition debts generally, subject to enumerated exceptions, mostly involving improper conduct, set forth in 11 U.S.C. § 727(a). In keeping with the "fresh start" purposes behind the Bankruptcy Code, a central purpose of the Code is to permit certain insolvent debtors to "enjoy 'a new opportunity in life with a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt.' [citation omitted]" *Grogan v. Garner*, 498 U.S. 279, 286 (1991).

11 U.S.C. § 523 provides, as an exception to § 727, that certain specific debts (or categories of debts) are not affected by the debtor's discharge. These non-dischargeable debts include certain taxes, spousal maintenance, child support and certain debts found to have been incurred under specific circumstances of wrongdoing. The sole subsection of 11 U.S.C. § 523(a) at issue in this case is subsection (4), declaring non-dischargeable debts for "fraud or defalcation while

acting in a fiduciary capacity, embezzlement or larceny."

B. 11 U.S.C. § 523(a)(4): as Interpreted by This Court.

The concept of denial of discharge for defalcation in a fiduciary capacity goes back to the Bankruptcy Act of 1841. Three years later, this Court considered whether a factor who sold property belonging to his principal, and failed to pay the principal the proceeds, owed him a debt created in a fiduciary capacity. The Court held that a factor was not a fiduciary and made clear that under the Bankruptcy Act, the concept of fiduciary should be narrowly defined:

> In almost all the commercial transactions of the country, confidence is reposed in the punctuality and integrity of the debtor, and a violation of these is, in a commercial sense, a disregard of a trust. But this is not the relation spoken of in the (Bankruptcy Act). . . . *The act speaks of technical trusts,* and not those which the law implies from the contract.

Chapman v. Forsyth, 2 U.S. 202, 207 (1844) (emphasis added).

Subsequently, this Court refined and narrowed the concept of fiduciary articulated in *Chapman,* making clear that the technical trust must exist prior to the act creating the debt and without reference to that act. See *Upshur v. Briscoe*, 138 U.S. 365, 378 (1890). As the Court stated in *Davis v. Aetna Acceptance Co.*, 293 U.S. 328, 333 (1934) (emphasis added):

> It is not enough that by the very act of wrongdoing out of which the contested debt arose, the bankrupt has become chargeable as a trustee ex maleficio. *He must have been a trustee before the wrong and without reference thereto.* In the words of Blatchford, J., "The language would seem to apply only to a debt created by a person who was already a fiduciary when the debt was created."

(Quoting *Upshur v. Briscoe*, supra.)

This court's restrictive reading of the phrase "fiduciary capacity" is fully consistent with the "fresh start" policy of federal bankruptcy law, *Lines v. Frederick*, 400 U.S. 18, 19 (1970), and the well-established principle in this Court that exceptions to discharge should be limited to those clearly expressed in the statute. *Gleason v. Thaw,* 236 U.S. 558, 562 (1915).

C. There is An Irreconcilable Split in Circuits and Non-Compliance With *Chapman.*

The circuits are split regarding the precise nature of the fiduciary relationship required to prove defalcation under § 523(a)(4). While there is unanimous agreement that defalcation requires: 1) a fiduciary relationship; 2) a breach of that fiduciary relationship; and 3) a resulting loss. *In re Garver*, 116 F.3d 176, 178 (6th Cir. 1997), about half the circuits, including the Ninth (whose orders are at issue here) and the Sixth (site of Kentucky, where the underlying case originated) require a further showing of an express or technical trust, rather than a mere showing of a fiduciary relationship, and a specific trust res

involved in the defalcation. This narrow interpretation of a fiduciary under § 523 (a)(4) would omit or not necessarily include situations where the individual was acting in a fiduciary capacity under law outside of bankruptcy.

The Sixth, Ninth, and Tenth Circuits have clearly adopted the narrow view of § 523(a)(4), requiring an analysis beyond mere existence of a fiduciary relationship. The Sixth Circuit, in *Garver*, found that an attorney-client relationship, although requiring the attorney to act in a fiduciary capacity, is not necessarily a fiduciary relationship under § 523(a)(4), 116 F.3d at 179 (attorney must hold funds in trust to satisfy the fiduciary element). In addressing whether the debt is the result of defalcation, the court rejected the broad definition – "failure to meet an obligation while acting in a fiduciary capacity" – and held that there must be an express or technical trust. *Id.*

Another Sixth Circuit case, *In re Penick*, cited at length in these Bankruptcy Court proceedings, follows the same logic, holding that "the mere recognition that an insolvent corporation or one of its directors owes a fiduciary obligation to the corporation's creditors does not create an actual trust fund as required by § 523(a)(4)." *Penick*, 149 F.3d at 4.

The Ninth Circuit, in its published opinions, has taken a similarly narrow view. See *In re Cantrell*, 329 F.3d 1119, 1126 (2002)(while officers and directors act in a fiduciary capacity, they are not trustees of corporate assets for purposes of non-dischargeability under 11U.S.C. § 523(a)(4)).

The Tenth Circuit holds that, as to a finding of nondischargeability under § 523(a)(4), "[t]he court must find that the money or property on which the debt at issue was based was entrusted to the debtor....an express or technical trust must be present," *In re Young*, 91 F.3d 1367, 1371-1372 (10th Cir. 1996)(despite the general fiduciary duty an attorney owes to a client, no fiduciary relationship existed for the purposes of § 523(a)(4), where an attorney and contractor exchanged services and the attorney failed to make an accounting to the contractor of the amount owed).

Other circuits appear to lean toward a narrow interpretation. The Eleventh Circuit held that a doctor's debt on a judgment relating to his failure to comply with a state statute requiring him to maintain malpractice insurance, an escrow account, or a letter of credit, did not fall under § 523(a)(4), because the statute did not entrust funds in the doctor. *In re Fernandez-Rocha*, 451 F.3d 813, 819 (11th Cir. 2006). The court discussed the inapplicability of "constructive" or "resulting" trusts to § 523(a)(4), "because the act which created the debt simultaneously created the trust relationship." *Id.* at 816.

The Eighth Circuit appears to adopt the narrow interpretation but is hopelessly inconsistent. The Bankruptcy Appellate Panel in that Circuit has held that the fiduciary relationship under § 523(a)(4) must be one arising from an express or technical trust, stating that a broad definition of confidence, trust and good faith does not apply. *In re Shahrokhi*, 266 B.R. 702, 707-708 (8th Cir. BAP 2001). One Panel of the Eighth Circuit held that "prior holdings of our court

and the United States Supreme Court require that we look specifically at the property that is alleged to have been defalcated to determine whether [the debtor] was legally obligated to hold that specific property for the benefit of the Funds. *Hunter v. Philpott*, 373 F.3d 873, 874 (8th Cir. 2004) (Judges Wollman, Arnold and Colloton).

But, just seven years earlier, a different Eighth Circuit Panel (Judges McMillian, Gibson and Magill) took a broader interpretation of 11 U.S.C. § 523(a)(4). The Court found that a judgment debt against an attorney who breached his duty by failing to disclose a conflict of interest and by usurping his clients' expected 20% interest in real estate, which he kept for himself, fell under § 523(a)(4), despite the absence of an identifiable trust res. *In re Cochrane*, 124 F.3d 978, 984 (8th Cir. 1997).

The Seventh, Fifth, and Second Circuits adopt a broad view of the fiduciary relationship required to fall under the non-dischargeability provision of § 523(a)(4). The Seventh Circuit focuses on the fiduciary relationship rather than the requirement of a trust or a debt that involves those funds. *Marchiando v. State of Illinois*, 13 F.3d 1111 (7th Cir. 1994). The *Marchiando* Court held that the applicable relationship is one where "one party to the relation is incapable of monitoring the other's performance of his undertaking, and therefore the law does not treat the relation as a relation at arm's length between equals," giving as examples lawyer-client, director-shareholder, and managing partner-limited partner. *Id.* at 1116. Although citing cases that say constructive, resulting, and implied trusts do not qualify for § 523(a)(4), the Court stated that the key to dischargeability is to find

a "trust or other fiduciary relation that has an existence independent of the debtor's wrong and a trust or other fiduciary relation that has no existence before the wrong is committed." *Id.* at 1115. A lawyer's fiduciary duty to his client, or a director's duty to his corporation pre-exists any breach of duty." *Id.*

The Fifth Circuit also follows this broad view, holding that § 523(a)(4) applies to a debt where a majority stockholder in a corporation made profit sharing contributions for his own benefit to the exclusion of the minority shareholder. *In re Davis*, 3 F.3d 113, 116 (5th Cir. 1993). The conclusion of non-dischargeability was based only on the breach of fiduciary relationship of the majority stockholder to the minority shareholder; no finding of a trust is mentioned.

The Second Circuit also adopts a broad view, citing *Marchiando* for its proposition that a debtor with a difference in knowledge or power over the principal fulfils the requirements of § 523(a)(4). *In re Hayes*, 183 F.3d 162, 167 (2nd Cir. 1999). The Court further stated, "it has been clear...that the defalcation exception is not limited to express trusts, i.e., situations where a trustee is a beneficial owner of a res held and managed for a named beneficiary." *Id.* A result of this interpretation is that the attorney-client relationship, although usually not involving a technical or express trust, is considered a fiduciary relationship within the meaning of the defalcation exception. *Id.* at 168. Further, the Court cites decisions regarding fiduciary status of directors, controlling stockholders, and corporate officers, notwithstanding the absence of an express trust. *Id.*

These decisions support the Court's holding that a debt was not dischargeable under § 523(a)(4), because an attorney owed a fiduciary responsibility to an estate. *Id.* The debt was for a judgment against an attorney based on excessive legal fees, which was a breach of this general fiduciary responsibility. *Id.*

The Fourth Circuit similarly held that an ambassador's debt resulting from him spending embassy funds to prepare a case for his own asylum was not dischargeable under § 523(a)(4). *In re Uwimana*, 274 F.3d 806, 812 (4th Cir. 2001). This holding was based on an assertion that "ambassadors are, by definition, fiduciaries for the country they represent." *Id.* at 811. The fiduciary relationship was based on entrustment with state secrets and financial assets and an expectation of undivided loyalty and faithful service. *Id.* at 811. That Circuit found a breach of duty based on a breach of loyalty, because "an agent must avoid conflicts of interests with his or her principal." *Id.* at 812.

It is unclear whether the remaining circuits follow the narrow or broad view. The D.C. Circuit and the First Circuit have not addressed the issue. The Third Circuit seems to take a broad interpretation of § 523(a)(4), finding that a director and shareholder owed a fiduciary duty to creditors, and thus his debt related to diversion of progress payments was not dischargeable. *In re Docteroff*, 133 F.3d 210, 217 (3rd Cir. 1997). However, in a case just six years earlier, the Third Circuit mentioned the narrow standard and its use by lower district courts within the Circuit, concluding that the distinction was not applicable to its case. *In re Goldberg*, 932 F.2d 273, 278 (3rd Cir. 1991).

The Ninth Circuit Panel of course, in its review of this case, follows the broad view, seeming to reverse precedent. (App. A). The Panel found that the Loan Payments and Bonus Payment are non-dischargeable under § 523, even though the record was clear that the payments were not made out of a trust res.

While there are other relevant cases, the cases above present the various approaches utilized by the circuits and demonstrate adequately the confusion.

Adding further to the inconsistencies and hopeless confusion among the Circuits is that in 1978 the language of the subject Code Section changed, and this Court has not set forth a post-1978 interpretation of defalcation in a fiduciary capacity. Indeed, this Court has not addressed defalcation in a fiduciary capacity under the Bankruptcy Code in more than 75 years. See *Davis,* 293 U.S. 328. Section 17(4) of the former Bankruptcy Act excepted from discharge debts for "misappropriation or defalcation ***while acting as an officer*** or in ***any*** fiduciary capacity." (emphasis added) The current section removes the reference to "officer" and further narrows the statute by removing the word "any." The change appears to narrow the possible interpretation of a fiduciary relationship.

The U.S. Constitution requires that bankruptcy laws must be uniform throughout the United States. *Railway Labor Executives' Ass'n v. Gibbons,* 455 U.S. 457, 468 (1982); U.S. Constitution, Art. 1, § 8, cl. 4. The divergences among decisions interpreting the current version of 11U.S.C. § 523(a)(4) are such as to require this Court to intervene and resolve the conflict among the Circuits, and to provided uniformity as required by Art. 1, § 8, Cl. 4 of the Constitution.

D. The Result in This Case is Markedly Different Depending Upon the Circuit, or even the Specific Panel in Each Circuit.

The question whether Glogower committed defalcation in a fiduciary capacity under 11 U.S.C. § 523(a)(4) evokes different answers in different circuits, and sometimes different answers in the same circuit, depending upon the panel.

In the Sixth and Tenth Circuits, Glogower would be entitled to a discharge, because those Circuits require an express or technical trust, and the Bonus Payment and Loan Payments were paid out of separate funds, not trust funds. *In re Young*, 91 F.3d 1367, 1371-1372; *Penick*, 149 F.3d at 4.

Under published Ninth Circuit law, Glogower would be entitled to a discharge, because the term "fiduciary" under § 523(a)(4) applies only to "express or technical trusts," and Glogower had no fiduciary obligation with respect to the 20% Administrative Fee out of which he paid himself. *In re Cantrell*, 329 F.3d at 1125. But under unpublished Ninth Circuit law, Glogower was denied a discharge and an entirely new obligation was imposed on the debtor, solely for purposes of this case: even though the trust funds were kept separate from the non-trust funds, Glogower paid himself "when he was fully aware that the entities (NBAT/NBA) he controlled could not pay the claims due the plan beneficiaries." (App. A).

In the Eleventh Circuit, the anticipated result is slightly less clear but, because the Court refers to the inapplicability of "constructive" or "resulting" trusts in a § 523(a)(4) non-dischargeability action, and because

any obligation in this case would necessarily involve a constructive or resulting trust rather than an express trust, it appears that Glogower would receive his discharge. *In re Fernandez-Rocha*, 451 F.3d at 819.

In the Eighth Circuit, the result would depend upon which Panel reviewed the Glogower case. The *Hunter* panel found that ERISA funds themselves are not necessarily trust funds and could reasonably be expected to rule that, because Glogower was not legally obligated to hold the 20% Administrative Fee for the benefit of the claimants under the 80% Claims Portion, he had no fiduciary obligation under § 523(a)(4). But Glogower might expect a different result in front of the *Cochrane* panel, 124 F.3d at 984, which might, based upon *Cochrane*, find that the administrator-claimant relationship is the type of fiduciary relationship in which a breach gives rise to non-dischargeability under § 523(a)(4).

In the Seventh Circuit, the key inquiry might be whether the claimants were capable of "monitoring [Glogower's] performance of his undertaking," or it might be whether a "trust or other fiduciary relation existe[d] independent of [Glogower's purported wrong." The result is unclear under this standard. *Marchiando*, 13 F.3d 1111.

Because the Second and Fifth Circuits have no trust requirement, Glogower would presumably be denied a discharge under § 523(a)(4). *Davis*, 3 F.3d at 116; *Hayes*, 183 F.3d at 167. The result in the D.C., First and Third Circuits is unclear based upon present law in those Circuits.

Under this Court's interpretation of 11 U.S.C. § 523(a)(4), there was no defalcation in a fiduciary capacity, because the funds paid to Glogower were not part of a technical trust, existing prior to the act creating the debt and without reference to that act. *Chapman,* 2 U.S. at 207; *Upshur,* 138 U.S. at 378; *Davis,* 293 U.S. at 333.

II. THE NINTH CIRCUIT'S MEMORANDUM PERMITS KENTUCKY STATE LAW TO OVERRIDE ESTABLISHED FEDERAL BANKRUPTCY LAW IN VIOLATION OF THE BANKRUPTCY CLAUSE OF THE U.S. CONSTITUTION

Congress has the exclusive power "[t]o establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States." U.S. Constitution, Art. 1, § 8, cl. 4 (the "Bankruptcy Clause"). Unlike, for example, the Commerce Clause, the Bankruptcy Clause itself contains an affirmative limitation or restriction upon Congress's power: bankruptcy laws must be uniform throughout the United States. *Railway Labor Executives' Ass'n v. Gibbons,* 455 U.S. 457, 468 (1982); see *Secretary of Agriculture v. Central Roig Refining Co.*, 338 U.S. 604, 616 (1950) (distinguishing the Commerce Clause from Art. I, § 8, cl. 4). Indeed, Bankruptcy is one of only two federal legislative powers enumerated in Article I, Section 8 of the Constitution as to which the power to make "uniform" laws is made explicit. See *Pacific Gas and Elec. Co. v. California ex rel. California Dept of Toxic,* 350 F.3d 932, 943 (9th Cir. 2003).

The Ninth Circuit's analysis is contrary to basic principles of federal primacy and uniformity, and its determination of non-dischargeability should be set aside.

A. The Ninth Circuit Memorandum Exalts Kentucky State Insurance Regulations Over Federal Bankruptcy Law, Thus Violating the Federal Preemption Doctrine.

The Liquidator recognizes and expressly acknowledges that the Memorandum Decision in her favor is a triumph of "***the state-based*** system of insurer insolvency regulation" over the purported "loopholes" of federal bankruptcy law. (App. M). But any such triumph is inconsistent with the federal preemption doctrine and cannot stand unchallenged.

The power of Congress to establish uniform laws on the subject of bankruptcies throughout the United States is unrestricted and paramount. U.S. Const. Art. I, § 8, cl. 4; *International Shoe Co. v. Pinkus*, 278 U.S. 261, 265 (1929). Congress exercised this power by enacting national, uniform bankruptcy laws, including the Bankruptcy Code, which necessarily exclude or displace any conflicting state regulation. *International Shoe*, 278 U.S. at 265. Accordingly, states may not pass or enforce laws to interfere with or complement the Bankruptcy Code or to provide additional or auxiliary regulations. *Id.* at 266. See also, *In re Wisconsin Builders Supply Co.*, 239 F.2d 649 (7th Cir. 1956), *cert. denied*, *Prentice v. Moskowitz*, 353 U.S. 985 (1957).

The Ninth Circuit Panel, reciting that the Kentucky State Court had found that NBAT and NBA

"were one entity," determined that it owed "full faith and credit" to that finding. The Panel's use of "full faith and credit" terminology evidences a profound miscomprehension of the interplay between state and federal law in bankruptcy case, which misconception led the Panel into error.

In a bankruptcy context, typical principles of *res judicata* and full faith and credit give way to the primacy of federal law. *Kalb v. Feuerstein*, 308 U.S. 433, 438-439 (1940) (States cannot, in the exercise of control over local laws and practice, vest state courts with power to violate the supreme law of the land.) Thus, while it is generally true that a judgment by a court of competent jurisdiction bears a presumption of regularity and is not thereafter subject to collateral attack, *Chicot County Drainage District v. The Baxter State Bank,* 308 U.S. 371 (1940), a different rule applies where a state judgment conflicts with federal bankruptcy law:

> Congress, because its power over the subject of bankruptcy is plenary, may by specific bankruptcy legislation . . . render judicial acts taken with respect to the person or property of a debtor whom the bankruptcy law protects nullities and vulnerable collaterally.

Kalb, 308 U.S. at 438-439.

The issue of non-dischargeability is to be determined by the bankruptcy court, with reference to federal law. See *Brown v. Felsen*, 442 U.S. 127 (1979),

interpreting § 17a(2) and (4) of the Bankruptcy Act.[2] Traditionally, the bankruptcy court determined whether the debtor was entitled to a discharge under § 14 of the Bankruptcy Act, but left the dischargeability of a particular debt under § 17 (now § 523) of the Act to be determined, after bankruptcy, by the court in which the creditor sued to enforce his prior judgment. In 1970, however, Congress altered § 17 to require creditors to apply to the bankruptcy court for adjudication of certain dischargeability questions, including those arising under §§ 17a(2) and 17a(4) (now §§ 523(a)(2) and (4)). 442 U.S. at 129-130.

The Senate Report accompanying the 1970 amendment described the bankruptcy court's jurisdiction over § 17 claims as "exclusive." S.Rep.No. 91-1173, p. 2 (1970). This Court noted in *Brown v. Felsen* that, while Congress did not expressly confront the problem created by pre-bankruptcy state-court adjudications,

> it would be inconsistent with the philosophy of the 1970 amendments to adopt a policy of res judicata which takes these § 17 questions away from bankruptcy courts and forces them back into state courts.

442 U.S. at 136. This Court noted further a statement by Professor Lawrence King, prepared for the National

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[2] Section 17 (2) omitted from discharge "liabilities for obtaining money or property by false pretenses or false representations . . . or for willful and malicious conversion of the property of another" and, under § 17a(4), debts that "were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity."

Bankruptcy Conference, included in both the House and Senate Reports and placed in the Congressional Record by Representative Wiggins:

> [I]f the bill is passed, a single court, to wit, the bankruptcy court, will be able to pass upon the question of dischargeability of a particular claim and it will be able to develop an expertise in resolving the problem in particular cases.

S.Rep.No. 91-1173, p. 9 (1970); H.R.Rep.No. 91-1502, p. 8 (1970).

Whether Glogower should be denied a discharge under 11U.S.C. § 523(a)(4) of the Bankruptcy Code is strictly a federal question. The entire field of bankruptcy, and specifically questions of discharge, is preempted by federal law. By deferring to the Kentucky Liquidation Order, the Ninth Circuit has improperly elevated Kentucky state insurance regulations over federal bankruptcy law.

The Ninth Circuit's reliance on the Kentucky Court's ruling becomes more problematic when one recognizes that the issue whether Glogower's conduct satisfied the standards for non-dischargeability under § 523(a)(4) was not, and could not have been, presented to the Kentucky Court. The issues in the Kentucky proceeding, as, indeed, the Liquidator made clear in her request for publication, had to do with the standards and procedures applicable to the liquidation of insolvent insurers under state law. (App. M). The issues presented by the Liquidator's bankruptcy adversary claim, in contrast, involve, specifically and exclusively, whether the Liquidator's claim is rendered non-dischargeable by virtue of acts within the

parameters of § 523(a)(4), i.e., whether the underlying debt was "for fraud or defalcation while acting in a fiduciary capacity."

The Kentucky Liquidation Order, considered objectively, does not purport to control the issues in this case. (App. H) There is no reference to regulation by or under bankruptcy laws, and no holding that the "one entity" finding would apply under 11 U.S.C. § 523(a)(4) or any other bankruptcy law. More to the point, nothing in the Liquidation Order addresses the core issue in this case – whether an express trust relationship existed as to the 20% Administrative Fee.[3]

Lest there be any doubt, the Kentucky Court of Appeals has made clear that the Kentucky Insurance Code is a distinct statutory framework, which cannot be interpreted with reference to any other laws. *Albany Ins. Co. v. Stephens*, 926 S.W.2d 460, 462 (Ky.App. 1995) ("[T]hat other jurisdictions may have reached disparate conclusions founded in their peculiar statutory structures has little impact upon our interpretation of the distinct principles codified in the Kentucky Insurance Code.").

The policies and fundamentals of the Bankruptcy Code in any event override any state law and any

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[3] The evidence, in any event, shows unequivocally that the 20% Administrative Fee and the remaining 80% of the NBAT revenues were accounted for and treated differently. There is simply no basis for the Ninth Circuit's extreme, and illogical, leap to the conclusion that, because NBA and NBAT were (or became) one entity under state insurance regulations, 100% of the assets of the combined entity were subject to an express trust under federal bankruptcy law.

underlying state court determination of liability in the first instance. The Ninth Circuit's explicit deference to findings of the Kentucky State Court cannot withstand challenge in light of the Bankruptcy Clause and the findings of the Memorandum Decision should therefore be set aside on grounds of federal preemption.

B. The Memorandum Violates This Court's Prohibition Against a Bankruptcy Rule That Applies Only to One Debtor.

The Ninth Circuit Memorandum fails the uniformity requirement in Art. I, § 8, cl. 4 for another reason. This Court holds that the Bankruptcy Clause prohibits Congress from enacting a bankruptcy law that, by definition, applies only to one debtor. *Railway Labor*, 455 U.S. at 473. To survive scrutiny under the Bankruptcy Clause, "a law must at least apply uniformly to a defined class of debtors." Moreover, a bankruptcy law that is "confined . . . to the affairs of one named debtor can hardly be considered uniform. To hold otherwise would allow Congress to repeal the uniformity requirement from Art. I, § 8, cl. 4, of the Constitution." *Id.* This Court thus held that a law enacted during and in response to the bankruptcy proceedings of one regional railroad, and that would be applied to and affect only that railroad, was repugnant to Art. I, § 8, Cl. 4, of the Constitution. 455 U.S. at 458.

The Ninth Circuit Panel relied on Glogower's purported knowledge that the 80% Claims Portion was insufficient to pay claims as a basis to impose on Glogower the obligation to make up the difference out of his own pocket, from the 20% Administrative Fee. (App. A). The effect of the Ninth Circuit Memorandum

is as though Congress had enacted a new law, applicable to only Andy Glogower, which law conflicts with prior law in the same circuit, is at odds with the express terms of 11 U.S.C. § 523(a)(4), and cannot be cited for any purpose in any other bankruptcy case. The Panel's conclusion that the 80% Claims portion was insufficient to pay claims was not only irrelevant, but constituted an *ad hoc* imposition of non-dischargeability, a result forbidden by the Bankruptcy Clause and applicable decisions of this Court. Accordingly, the Ninth Circuit interpretation and application of § 523(a)(4) "repugnant" to Art. I, § 8, cl. 4, of the Constitution. 455 U.S. at 458.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted, the Ninth Circuit Memorandum reversed, the District Court Order affirmed, and the matter remanded for further proceedings.

RESPECTFULLY SUBMITTED this 7th day of August, 2009.

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